

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

IRA DAVID HAZELKORN

A Member of the State Bar

[No. 89-O-16758]

Filed June 27, 1991

## SUMMARY

Respondent was charged with making a court appearance while on suspension for nonpayment of dues, in wilful violation of Business and Professions Code sections 6106, 6125, 6126 and 6127(b). Respondent's default was entered in the disciplinary proceeding, resulting in the charges against him being admitted. At the default hearing, the examiner introduced the transcript of respondent's improper court appearance. The transcript revealed that when the judge asked respondent about his status with the State Bar, respondent indicated that his records showed that his dues had been paid. The examiner also introduced evidence showing that respondent paid his dues and was reinstated to the practice of law on the same date as his court appearance. No evidence was introduced to establish the *time* of that payment. The hearing judge found that the evidence offered by the examiner negated respondent's admission (by default) that he practiced law while on suspension. The hearing judge therefore dismissed all charges. (Hon. Christopher W. Smith, Hearing Judge.)

The examiner sought review. The review department held that ambiguous evidence which can be interpreted as consistent with the allegations of the notice to show cause does not negate the admission of the charges by default. Because respondent's remarks were more consistent with his having paid his dues after his court appearance than with his having done so before, the review department held that although the evidence introduced by the examiner fell below clear and convincing proof of practicing law while suspended, the evidence was not inconsistent with the charging allegations which had been admitted. The review department therefore found respondent culpable of violating sections 6125 and 6126 of the Business and Professions Code, though it upheld the hearing judge's findings of no culpability of violating sections 6106 and 6127(b). The matter was remanded for further proceedings as to appropriate discipline.

## COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: No appearance (default)

HEADNOTES

- [1]      **106.10 Procedure—Pleadings—Sufficiency**  
          **106.20 Procedure—Pleadings—Notice of Charges**  
          **230.00 State Bar Act—Section 6125**  
          **231.00 State Bar Act—Section 6126**  
Notice to show cause properly charged respondent with practicing law while suspended, in violation of sections 6125 and 6126(b), despite language in notice describing respondent as having made court appearance while “on inactive . . . status,” when respondent was actually suspended for nonpayment of dues.
- [2]      **107 Procedure—Default/Relief from Default**  
          **135 Procedure—Rules of Procedure**  
          **162.19 Proof—State Bar’s Burden—Other/General**  
A respondent’s default results in the admission of the facts alleged in the charging allegations of the notice to show cause, and no further proof is required to establish the truth of those charges. (Trans. Rules Proc. of State Bar, rules 552.1(e), 555(e).)
- [3 a, b] **107 Procedure—Default/Relief from Default**  
          **159 Evidence—Miscellaneous**  
          **162.11 Proof—State Bar’s Burden—Clear and Convincing**  
          **204.90 Culpability—General Substantive Issues**  
In a default proceeding, ambiguous evidence that can be interpreted as consistent with allegations of the notice to show cause does not negate the deemed admissions of the notice to show cause. Where evidence introduced at default hearing fell short of clear and convincing proof of charged violations, but was not inconsistent with charging allegations, defaulting respondent should have been found culpable of violations properly charged.
- [4]      **231.50 State Bar Act—Section 6127**  
Business and Professions Code section 6127(b) does not apply to a member of the State Bar practicing law while suspended.
- [5]      **221.00 State Bar Act—Section 6106**  
Evidence that respondent practiced law while on suspension by making one court appearance prior to paying dues and being reinstated, did not establish culpability of moral turpitude, dishonesty or corruption, where hearing judge found credible respondent’s statement during said court appearance that respondent believed his dues had been paid.
- [6 a, b] **125 Procedure—Post-Trial Motions**  
Examiner’s belated post-trial motion seeking to introduce evidence of additional acts of misconduct was properly denied, where examiner failed to explain why motion was not made until after trial even though evidence was brought to examiner’s attention prior to trial.
- [7]      **106.20 Procedure—Pleadings—Notice of Charges**  
          **204.90 Culpability—General Substantive Issues**  
Evidence of additional uncharged acts of misconduct could not constitute an independent basis for culpability.

**[8 a, b] 106.20 Procedure—Pleadings—Notice of Charges****107 Procedure—Default/Relief from Default****565 Aggravation—Uncharged Violations—Declined to Find**

Uncharged facts cannot be relied upon for evidence of aggravation in a default matter because the respondent is not fairly apprised of the fact that additional uncharged facts will be used against him. The use of uncharged aggravating factors in contested proceedings presents a different question.

**[9] 125 Procedure—Post-Trial Motions**

Examiner's post-decision motion for reconsideration and request for receipt of additional evidence of culpability was properly denied, where there was no showing why the proffered additional evidence could not have been presented at the time of the original hearing.

**ADDITIONAL ANALYSIS****Culpability****Found**

230.01 Section 6125

231.01 Section 6126

**Not Found**

221.50 Section 6106

231.55 Section 6127

## OPINION

PEARLMAN, P.J.:

This case presents a very simple issue regarding the interplay in a default proceeding of deemed admissions of allegations in the notice to show cause and evidence adduced by the examiner at the default hearing. The hearing judge dismissed the proceeding on a finding that the proof at the hearing undercut or negated the essential allegations of the notice to show cause. The hearing judge also denied a post-trial motion to augment the record and a motion for reconsideration based on additional proffered evidence. The examiner requested review. While we agree with the hearing judge that the post-trial motions were not well taken, we conclude that the original evidence was not inconsistent with the deemed admissions and that culpability was established of violations of Business and Professions Code sections 6125 and 6126.<sup>1</sup> We remand for determination of the appropriate discipline.

## DISCUSSION

Upon the examiner's request for review pursuant to rule 450, Transitional Rules of Procedure of the State Bar, we now conduct our own independent review of the record of the proceedings below. (Trans. Rules Proc. of State Bar, rule 453.) The one-count notice to show cause charged respondent Hazelkorn with wilfully making a court appearance on October 5, 1989, while on "inactive" [sic] membership status for failure to pay 1989 State Bar membership dues "in wilful violation of sections 6106, 6125, 6126 and 6127 (b)."<sup>2</sup> [1 - see fn. 2] The notice to show cause

and subsequent notices with respect to entry of default were found by the hearing judge to have been properly served on the respondent's most recent membership address. Respondent made no effort to set aside the default.

[2] Respondent's default resulted in the admission of the facts alleged in the charging allegations. (Trans. Rules Proc. of State Bar, rules 552.1(e) and 555(e).) As a consequence, no further proof was required to establish the truth of those charges. (Trans. Rules Proc. of State Bar, rule 552.1(e).) At the default hearing below, the examiner introduced the transcript of a criminal proceeding in *People v. James Lee Penner, Cherokee Construction Co. and Clyde Ewing*, case number 88-T-02888 (State Bar exhs. 1 and 5) showing that respondent appeared at 10 a.m. on October 5, 1989, in Division 4 of the Municipal Court, Antelope Judicial District in Los Angeles. Respondent represented defendant Clyde Ewing at that hearing.

During the course of the October 5, 1989, hearing the deputy district attorney brought to the court's attention the issue of respondent's suspension for nonpayment of State Bar membership fees. The transcript reflects that a colloquy ensued as to whether respondent was, in fact, suspended with respondent indicating that he had received notice from the State Bar of his nonpayment of membership fees, but he stated that "my records show that I have paid it." (Exh. 1, p. 5.) The examiner introduced documentary evidence at the hearing below (exh. 3) proving that respondent paid his State Bar membership fees on October 5, 1989, and his membership was restored on that date with all privileges, duties and responsi-

1. Unless otherwise noted, references to sections are to the sections of the Business and Professions Code.

2. [1] The notice to show cause alleged that: "[¶] 1. By certified letter to you dated July 14, 1989, you were served with a copy of the order of the Supreme Court of California advising you of your suspension from active membership status in the State Bar of California for nonpayment of 1989 State Bar membership fees. [¶] 2. Thereafter, on October 5, 1989, while still on inactive membership status with the State Bar, you wilfully appeared in the Municipal Court, Antelope Judicial District, County of Los Angeles, on behalf of Defendant Clyde Ewing, in that matter entitled *People v. James Lee Penner, Cherokee*

*Construction Co. and Clyde Ewing*, Case No. 88-T-02888." While the failure to pay State Bar membership fees when delinquent results in suspension of a member by the Supreme Court (Bus. & Prof. Code, § 6143) and not inactive enrollment, the Supreme Court has authorized the charge of violating section 6125 in cases where an attorney was suspended. (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 604.) We also see no problem under section 6126 (b) posed by the language of the notice to show cause in light of the prohibition of section 6126 (b) of practicing law by anyone inactively enrolled or suspended and the recitation in the notice that respondent had been suspended. (Cf. *Brockway v. State Bar* (1991) 53 Cal.3d 51, 63.)

bilities incident thereto. The time of payment was not established by any evidence in the record.

The hearing judge interpreted the evidence offered at the default hearing as undercutting or negating respondent's admission by default of the charging allegation that he practiced law on October 5, 1989, while under inactive enrollment for nonpayment of State Bar membership fees. In so ruling, the hearing judge relied on the review department's analysis of evidence offered in a default proceeding. (See *Conroy v. State Bar* (1991) 53 Cal.3d 495, 502, fn. 5.) However, *Conroy v. State Bar* involved evidence at the hearing which in fact contradicted the charging allegation that Conroy had made numerous misrepresentations to the superior court and the State Bar investigator. [3a] As we have recently held in *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, ambiguous evidence that can be interpreted as consistent with allegations of the notice to show cause does not negate the deemed admissions of the notice to show cause. Indeed, respondent's remarks at the hearing appear more consistent with the examiner's contention that the respondent checked with the State Bar after the morning hearing on October 5, 1989, and paid his State Bar membership fees that afternoon than that he paid them before the hearing. While the evidence introduced at the hearing below falls short of clear and convincing proof of practicing law while suspended, it is not inconsistent with the charging allegations.

[4] The examiner does not challenge the decision below that respondent did not violate section 6127 (b). She agrees that the charge was inappropriate because section 6127 (b) was not intended to apply to the offense of a member practicing law while suspended. (Decision at p. 7, citing *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229.) [5] The examiner also acquiesces in the finding of no culpability under section 6106 because the admitted charged allegation of "wilfully making a court appearance" and the evidence offered at trial in support thereof fell short of evidence proving moral turpitude, dishonesty or corruption.

Indeed, the evidence offered at trial indicated that respondent believed he had paid his fees and the examiner does not dispute that the hearing judge acted within his discretion in finding such evidence credible.

[6a] At the hearing below, the examiner belatedly offered additional evidence that respondent practiced law on other occasions while suspended. (See exh. 5 and attachments to motion to augment record.) The motion to augment the record was made on November 16, 1990, and recited that the information was new information received after trial on June 2 [sic], 1990. The trial in fact occurred on August 29, 1990, and the record was held open until September 12, 1990, for receipt of a certified copy of exhibit 5. The moving papers in the motion to augment the record stated that the information of other acts of practicing law while suspended was contained in an additional complaint received by the State Bar on or about July 18, 1990, and reported by an investigator to the examiner on August 1, 1990. The examiner did not explain why she waited until November to seek to augment the record after learning of the existence of other alleged acts of practicing law while suspended. The hearing judge denied her motion and also refused to consider making findings in aggravation based on exhibit 5 which consisted of evidence of uncharged instances of other alleged acts of practicing law while suspended. [7] This evidence could not constitute an independent basis for culpability because it was uncharged. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.) [8a] It was also rejected as grounds for a finding in aggravation based on our decision in *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 213 (uncharged facts cannot be relied upon for evidence of aggravation in a default matter because the respondent is not fairly apprised of the fact that additional uncharged facts will be used against him). (Decision at pp. 4, 8, fns. 4, 5.) [6b] The examiner does not challenge that ruling and on our independent review we agree with the hearing judge's rulings.<sup>3</sup> [8b - see fn 3]

The hearing judge also denied the examiner's subsequent motion for reconsideration and request

3. [8b] The use of uncharged aggravating factors in contested proceedings presents a different question. (See *Arm v. State*

*Bar* (1990) 50 Cal.3d 763, 775; *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)

for receipt of additional evidence of culpability on the single charged count because there was no showing why the proffered additional evidence could not have been presented at the time of the original hearing. The examiner also does not challenge that ruling, and we again see no basis for disturbing the ruling of the hearing judge in this regard.

#### CONCLUSION

[3b] For the reasons stated above, we agree with the dismissal of charged violations of sections 6106 and 6127 (b) but conclude, contrary to the court below, that respondent was culpable of violating sections 6125 and 6126 on the charged offense of practicing law while suspended on October 5, 1988. Having found respondent culpable of violating two statutes by virtue of his October 5, 1989, court appearance, we remand for determination of the appropriate discipline.

We concur:

NORIAN, J.  
STOVITZ, J.